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ABSTRACT

In the Lau vs. Nichols case, a suit was brought by Chinese-speaking students against the San Francisco Unified School District, asking the district to implement programs in Chinese that would permit them to learn English. The basic claim of these non-English-speaking children is that in refusing to meet their learning needs, the district is violating their right to adequate educational opportunity under the equal protection clause of the Constitution. The social, economic, and political discrimination against the Chinese and Mexican-Americans forced them into an isolation that has resulted in large communities of non-English-speaking students in California and the Southwest. Since language is an integral part of the ethnic culture of the students involved, discrimination based on language is one manifestation of discrimination based on national origin. In the Lau case, the Ninth Circuit Court ruled that there could be no state action unless the school district had had a specific intent to discriminate. However, the Supreme Court on other occasions has found a seemingly nondiscriminatory policy to be a violation of equal protection when it had a discriminatory impact. It is possible to find both the teachers and the funds to implement the required programs, and the question now is to what extent the courts will become involved in the education process. (Author/PM)

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LITIGATING THE RIGHTS OF THE BILINGUAL SCHOOL CHILD TO EQUAL EDUCATIONAL OPPORTUNITY

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Today, in America, millions of school children sit mute in their classrooms. They understand little of what is being taught.[1] They suffer from no congenital defect or disease, but because of circumstances beyond their own control, they do not understand the English language. Their parents may be newly arrived in New York City from Puerto Rico or, they may have spent their early childhood in the "barrios" of Los Angeles. Whatever the reason for their language difference, the school districts' failure to take account of their lack of English is causing them irreparable damage.

Presently, before the Supreme Court of the United States is a case, Lau v. Nichols, brought by Chinese-speaking students against the San Francisco Unified School District. These children, some of whom are newly arrived immigrants and others who have lived their whole lives in Chinatown, are asking the District to implement programs

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1 The population statistics suggest the enormity of the problem. There are over nine million persons of Spanish origin in the United States. "The majority of Spanish origin persons live in households where Spanish is the current language, as 6.0 million of the 9.2 million persons of Spanish origin, or 65 percent, reported Spanish as the language currently spoken in their home . . . Among persons of Spanish origin who were 5 to 19 years old, 64 percent were living in homes where Spanish was the current language." U.S. Department of Commerce, Bureau of the Census, Persons of Spanish Origin in the United States: March 1972 and 1971, Series P-20, No. 250, April 1973, pp. 1-2.

in Chinese that would permit them to learn English. According to the district court, even though these children were suffering educational deprivation since their courses were taught in English, the School District had no obligation to provide them with instruction any different from that provided all other students, and certainly not instruction in a language other than English. The Ninth Circuit affirmed, 472 F.2d 909 (1973), holding that since the School District did not create the language differences, under the Fourteenth Amendment the School District had no duty to take into account these children's educational requirements. The Supreme Court decision in this case will, most likely, be the definitive legal statement of non-English-speaking childrens' rights for many years to come.

This article will first discuss the nature of the legal claim made by Plaintiffs in the Lau case, and then cite briefly similar cases presently pending in the courts.

WHY DOESN'T EVERYBODY SPEAK ENGLISH?

Most persons unfamiliar with the language issue in the schools ask: "Why are these children coming to school speaking Chinese or Spanish? Why haven't they learned English?" The answer is a complicated one. The history of the Chinese American is replete with instances of discriminatory treatment. Almost from the date of California's admission to the Union, by law and custom, the Chinese have been segregated and

deprived of equal opportunities. The Foreign Miners Tax Act of 1853, Ch. 61, (1853) Calif. Stats. 218, a head tax for Chinese engaged in fishing, Ch. 316, (1860) Calif. Stats. 307, the San Francisco Laundry ordinance voided by the Supreme Court in the great case of Yick Wo v. Hopkins, 118 U.S. 356 (1886), were all attempts to limit employment opportunities. The California Constitution of 1879 disqualified persons born in China from voting, Calif. Const. Art. II Section 1 (1879). Their children were excluded by an English literacy test found unconstitutional just three years ago, Castro v. State, 2 Cal. 3d 223 (1970). Moreover, segregated schools were statutorily mandated, and continued until 1947. The result of this discrimination is a continued high rate of Chinese speaking children and higher school drop out rates caused by a lack of Chinese language courses designed to teach English.

For the Mexican American, the largest non-English-speaking group in California and the United States, the reasons date back to the turn of the century when the importation of Mexicans began in order to provide agricultural labor. During the Mexican Revolution (1912 - 1919), large numbers of people immigrated to the Southwestern states to escape the continuous turmoil. They formed barrios and colonias on the outskirts of small towns and in the hearts of the cities. Their isolation was, in large part, the result of the same kind of social, economic, and political discrimination that confronted the Chinese American in California and the black man in the South. Schools were segregated, Mendez v. Westminster

School District, 161 F.2d 774 (9th Cir. 1948), Cisneros v. Corpus Christi School District, 459 F.2d 13 (5th Cir. 1972), political rights were denied, Castro v. State of California, 2 Cal. 3d 223 (1970), Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972) aff'd sub nom White v. Regester, 41 U.S.L. Week 4885 (June 18, 1973), and the Mexican American was forced to wear the stigma of social discrimination, Hernandez v. Texas, 347 U.S. 475 (1954). This forced isolation, combined with the continued infusion of Spanish-speakers from Mexico has resulted in large numbers of children throughout California and the Southwest who still speak Spanish.

MUST SCHOOL DISTRICTS HELP THESE CHILDREN LEARN ENGLISH THROUGH THEIR NATIVE LANGUAGE?

The basic claim of non-English-speaking children is that their right to an adequate educational opportunity under the equal protection clause is denied when they are compelled to sit uncomprehendingly in the classroom. Last term, the Supreme Court upheld the school financing scheme of the State of Texas, in part on the ground that the state and local sources provided enough money to give an "adequate" education to school children around the state. Lau's basic contention is that a curriculum incomprehensible to those supposedly being taught will not meet even the Supreme Court's limited adequacy standard.

For equal protection purposes, the San Francisco Unified School District and other school systems around the country have two classes of

students. The first group are those who speak and benefit from an educational program in English. The second group is composed of non-English-speaking children; they neither speak English nor benefit from such a program. Educationally, however, the school system treats both groups as being similarly situated by teaching them with the same materials and in the same classroom. The essence of the Fourteenth Amendment ground is that this similar educational treatment for these demonstrably different children is constitutionally inappropriate.

The argument is basically commonsensical. Since school districts rigidly refuse to meet the learning needs of non-English-speaking children, they are denied the benefit of any education. The results of this non-education are demonstrable. Non-English-speaking children immediately fall behind their peers in achievement. They develop a sense of lessened self esteem, especially when they discover that their culture, as well as their language is non-functional in their first academic environment -- the place where intellectually they are trained to meet the world. The ultimate effect is drastically lower academic achievement and high drop-out rates.[2]

In Lau, the Ninth Circuit reacted to this argument by stating that in order to gain relief, Plaintiffs would have to prove that a) the

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2 See Mexican American Education Study Reports of the United States Commission on Civil Rights published in five installments, 1971-1973.

school district was responsible for the difference in language ability, and b) the school district had a specific intent to discriminate against them. The discriminatory impact of a school policy was held to be irrelevant for equal protection purposes because, according to the Court, there can be no state action unless there is specific intent. Seemingly, support for this position is found in the recent Supreme Court decision of Keyes v. Denver School District No. 1, _____ U.S. _____ (1973). There, the de jure/de facto distinction was preserved in a school desegration context. However, the Court did not need to abandon the distinction to decide the case since requisite intent was shown. Furthermore, the Supreme Court in Keyes did not disavow Wright v. City of Emporia, 407 U.S. 451, 462 (1972), where the Court said that the effects of school policies were controlling, and not the intent of the school officials.

The Supreme Court on many occasions has found a state's evenhanded treatment to be a violation of equal protection when it had a discriminatory impact. For example, Bullock v. Carter, 405 U.S. 134 (1972) outlawed excessive filing fees for poor political candidates; Griffin v. Illinois, 351 U.S. 12 (1956) required the state to provide an indigent prisoner with a transcript for appeal purposes. Moreover, when the issue of discrimination based on language has been litigated, the courts have not required a specific intent to discriminate. See, e.g. Castro v. State of California, supra, where an English language literacy requirement for voting was overturned and United States ex rel Negron v. New York,

434 F. 2d 386 (2nd Cir. 1970), which held that it violated due process to fail to employ a translator for a non-English-speaking criminal defendant.

In education, the Supreme Court has delved below the patina of equality when investigating the true educational impact of a particular policy. In Sweatt v. Painter, 399 U.S. 626 (1950) a newly created law school for blacks could not offer its students the same educational experience as the considerably older, more prestigious white state school. McLaurin v. Oklahoma State Regents, 399 U.S. 637 (1950) held that intangible considerations such as "[the student's] ability to study, to engage in discussions and exchange views with other students, and in general, to learn" affected the equality of treatment. Recently, in Wisconsin v. Yoder, 406 U.S. 205 (1972) a compulsory education law, although neutral on its face, was found unconstitutional since it severely burdened the free exercise of religion of the Amish.

Another aspect of "equal protection" is inherent in the language issue. Most children who do not speak English by the time they come to school do not speak English because their home language is the language of the foreign country from which their parents came. Language is an integral part of their ethnic culture and therefore, discrimination based on language is but one manifestation of the larger category of discrimination based on national origin. The Supreme Court has determined that discrimination based on national origin is a "suspect classification" for

application of "equal protection" tests, Graham v. Richardson, 403 U.S. 365 (1971).

Few cases other than Lau have dealt with the rights of non-English-speaking children. In Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D.N.Mex. 1972) the court ordered the school district to provide bilingual/bicultural education to Spanish surnamed children, since the achievement scores of Spanish surnamed children empirically revealed that "equal treatment for unequals" is unequal treatment. The court in Aspira v. Board of Education of New York City, 58 F.R.D. 62, 63 (S.D. N.Y. 1973), a case raising the same issues, stated that "the notion that sharply disparate people are legally fungible cannot survive the constitutional quest for genuine and effective equality."[3]

The school systems' principal response to these educational and legal arguments is that a clear constitutional standard of decision is not available. Which students will need this special language training? What will be the content of the curriculum? How much of the student's language

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3 The Civil Rights Act of 1964, Title VI and regulations issued by the Department of Health, Education and Welfare particularize the rights of non-English-speaking children. 35 Fed. Reg. 11595 (July 18, 1970), states in pertinent part:

> "Where inability to speak and understand the English language excludes national-origin minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to gear its instructional program to these students."

is necessary in the classroom? Who will teach the necessary courses? All of these questions suggest that the courts would be entering the educational thicket without an easy way out.

A related problem is the financing of this type of education. While it may take no more than teachers who speak the language in question to satisfy most of the needs of non-English-speaking children, the existing programs funded under the federal Bilingual Education Act, 20 U.S.C. Sec. 880b and various state acts, have spent large sums above the ordinary allocation per child.

However, these "in terrorem" arguments of school districts are highly questionable. A standard of reasonableness could be developed which would allow the school district wide discretion in choosing the type of language program suitable for the particular children in its district. Large amounts of extra money would not be necessary since the money now being used to provide space for non-English-speaking students -- I hesitate to say educate -- would be shifted to these new programs. Furthermore, school districts have developed the resources necessary to teach mentally and physically handicapped children, surely a more expensive proposition than guiding non-English-speaking children into the English language. Massachusetts and Alaska have shown that these programs are feasible by adopting precisely the relief requested by the Plaintiffs in Lau.

In deciding the Lau question the Supreme Court is likely to go through a delicate balancing process. The demands of the non-English-speaking children are commonsensical and obviously meritorious. They

touch upon interests that approach being fundamental and they create suspect classifications for equal protection purposes. The question is to what extent the courts will become involved in the education process. The Supreme Court refused the invitation in San Antonio I.S.D. v. Rodriguez, 36 L.Ed. 2d 16 (1973) in an issue that was particularly appropriate for legislative resolution. It is considerably more likely to become involved here, as exclusion from the learning process is nearly absolute. Furthermore, courts can devise standards of decision as easily as legislatures, and unless courts act, it is apparent that the problem will not be alleviated by the legislatures.